FILED
DEC 23
CHARLES ELMORE

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,
Petitioner,

vs.

PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit
and
BRIEF IN SUPPORT THEREOF.

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PETER BARCELOUX COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF MATTERS INVOLVED.

This is a suit in equity brought in the District Court of the United States for the Northern District of California, Northern Division, by petitioner herein, Trustee in Bankruptcy, against respondent for the recovery of the value of certain shares of corporate stock alleged to have been transferred by the petitioner's bankrupt, Henry Joseph Barceloux, in fraud of creditors at a time more than four months preceding the adjudication in bankruptcy of said bankrupt (National Bankruptcy Act, Section 70 e; U. S. Code, Title 11, Section 110 e), and for an accounting to ascertain the value of said shares alleged in the bill to have been necessary to such ascertainment (R. 2-14). The answer, admitting the transfer in pledge as alleged, denied that it was fraudulent (R. 17-20), and admitted, as also alleged, that the defendant had foreclosed the pledge by sale and had thereafter sold the shares to one George A. Barceloux (R. 20, 26). George R. Freeman, originally made a co-defendant, was dismissed without prejudice as an unnecessary party before trial but after the answer was filed by the defendant (respondent herein) (R. 29). The case thus standing proceeded to trial on the issues joined by the petitioner (plaintiff below) and respondent (defendant below) as the only parties in the case. The trial was had by the Court and judgment was rendered for the plaintiff (petitioner herein) upon a finding (R. 34) that the transfer of said shares of corporate stock was fraudulent under Section 3439

of the Civil Code of the State of California* and also fraudulent, under Section 3440 of the Civil Code of the State of California,* in that there was no immediate delivery of the stocks by the pledgor to the pledgee, because the bankrupt, as pledgor, delivered to and held the stock certificates himself as president of the pledgee company. The judgment also ordered a reference to an auditor to make an accounting in order to ascertain the value of the shares in question (R. 42), and upon the report of the auditor, confirmed by the Court and found to be true in fact, a final decree was entered for plaintiff in the sum of $106,-409.44 and costs taxed in the sum of $173.15, besides an allowance to the auditor or master (R. 103).

The appeal was taken by the defendant (respondent herein) from said final decree to the United States Circuit Court of Appeals for the Ninth Circuit, where, after argument, and reargument ordered by that Court on its own motion because of diversity of opinion and some doubt expressed, the decree of the trial Court was reversed, with directions for a modified decree to be entered on remand and for proceedings to carry out the modified decree. Said opinion reversing the final decree was upon divided Court, Honorable William H. Sawtelle, Circuit Judge, dissenting with an opinion (R. 483) contending for affirmance of the decree of the lower Court upon fraud as alleged in the complaint and proven and found at trial.

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*Said sections of the Civil Code are set forth in full in the appendix hereto.

Upon reargument, the appellant (respondent herein) offered in briefs and during oral argument to submit or tender the shares in question, released by George A. Barceloux (not a party to the suit) for disposition by a decree to be ordered by the Circuit Court of Appeals. That tender was afterwards put in writing in the form of letters addressed to the Clerk of the Court for information of the Judges, which letters were filed among the papers in the case, and the modification directed gives effect to the tender. No tender was made in the pleadings or otherwise in the trial Court, and its record shows none. In order to provide, if possible, a record of the matter, these letters are incorporated in the record of the proceedings in the Appellate Court (R. 452, 453). The record of the trial Court shows how the defendant (respondent herein) came into possession of the certificate for the shares after it had sold them to George A. Barceloux, its president and a brother of the bankrupt (R. 418-419), and also shows why only a part of the shares were tendered (the others had been again resold to other buyers) (R. 182, 289). The Circuit Court of Appeals on petition for rehearing modified its own judgment to allow for the value of those not tendered as a credit upon the indebtedness of the bankrupt to the defendant (R. 507).

The principal matters or questions involved are as follows:

1. The proper construction of Section 70 e of the National Bankruptcy Act (U. S. Code, Title 11, Section 110 e) as to whether a court of equity in a

suit for value only could give a money decree where it appeared that because of facts subsequent to issue joined the transferred property might have been recovered by the Trustee; and whether the Trustee has any election to recover value when property can be or might have been recovered.

2. Whether a tender not made in the trial Court may be made and entertained in the Circuit Court of Appeals in the first instance, and the decree of the trial Court be reversed or modified in consequence, the circumstances being as set out heretofore in the summary statement.

3. Whether in a suit in equity by a Trustee in Bankruptcy for relief against a fraudulent transfer "arising out of a controversy in bankruptcy" and brought under the National Bankruptcy Act, Section 70 e, rights and priorities among creditors, may be adjusted and proceeds of property be distributed without trenching upon province of a court of bankruptcy.

4. Whether the taking of additional security by one defrauded creditor, which security is recognized as junior to a pledge claimed or held by the fraudulent transferee, estops the defrauded creditor to say that there was fraud in the senior pledge, and whether such fact could operate against the Trustee in Bankruptcy, suing for all the creditors, to set aside and annul the pledge, which under state law was fraudulent as to all parties who were then creditors, of whom there were many.

5. Whether under the law of California, Civil Code Section 309, as it stood at the time in 1926, and the decisions of the Court of last resort of California thereunder, a California corporation which has sold its shares may resume title to said shares and thus reduce its capital, the purchaser being solvent and the resumption of title being merely a voluntary re-transfer.

6. Whether the defendant pledgee by selling the shares to George A. Barceloux (which it had bought in at the pledge sale) thereby repudiated any further obligation as pledgee and thus converted the shares, giving such right of action for value as the Circuit Court of Appeals recognized in its opinion would be sustainable (R. 481).

7. Whether a valid pledge as against creditors of pledgor could be accomplished by a purported delivery of the indorsed certificate evidencing said shares from the pledgor to himself as president of the pledgee corporation, with no other change of possession and followed by a continued possession of said certificate by himself and without any registration at the time on the books of the corporation.

8. Whether the decision of the Circuit Court of Appeals in reversing the trial Court's finding of the fact of fraud, in the pledge based on the trial Court's observation of the defendant's witnesses, whom the trial judge heard and disbelieved, and on the other indefinable impressions received at the trial, departed from the customary principles of appellate review of

decisions of fact, and thereby in matter of law erred in a way probably in conflict with the great weight of authority.

The foregoing questions (which were all seasonably presented on appeal) pervaded and materially affected the decision of the Circuit Court of Appeals, to the prejudice of the petitioner (appellee below), and thereupon the petitioner, as appellee, petitioned the Circuit Court of Appeals for a rehearing and reargument to correct assigned errors in its decision. The petition for rehearing was denied (R. 506).

REASONS FOR GRANTING PETITION FOR WRIT TO CIRCUIT COURT OF APPEALS.

1. The decision of said Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court of the United States' power of supervision, in this:

(a) That said Appellate Court based its decree on evidence introduced and on certificates of stock tendered during the appeal, and which said evidence and tender do not appear in the record of the proceedings before the trial Court, all of which was in direct conflict with the provisions of U. S. Rev. Stats., Section 698 (U. S. Code, Title 28, Section 863), and in conflict with the applicable decisions of this Court respecting the consideration of new matters on appeal, to-wit:

Realty Acceptance Corporation v. Montgomery, 284 U. S. 547, 549;
Blease v. Garlington, 92 U. S. 1, 4;
Roemer v. Simon, 91 U. S. 149, 150.

(b) The decision of the Circuit Court of Appeals in giving directions to the trial Court as a court of equity in a suit "arising out of a controversy in bankruptcy" under Section 70 e of the National Bankruptcy Act to sell the property and "to direct the application of the proceeds of the sale in accordance herewith," namely, to distribute the proceeds in order of priorities adjudged (in fixing the right and priority of one not a party), and the surplus, if any, to general creditors, usurps the power and jurisdiction of a court of bankruptcy and is a decision of a Federal question in a way probably in conflict with applicable decisions of this Court as regards the province and jurisdiction of a court of bankruptcy, to-wit:

Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 295, 302, 304.

2. That the Circuit Court of Appeals has decided important questions of local and general law in a way in conflict with applicable decisions, in this:

(a) That in holding that a defrauded creditor is estopped to assert fraud by a recital in a second pledge taken subsequently to the fraudulent transaction, the suit being not one by the creditor to enforce the junior pledge agreement but one commenced by a Trustee in Bankruptcy representing the defrauded

creditor as an unsecured creditor, together with all the other and general unsecured creditors of said bankrupt.

(b) And in holding contrary to the local statutes which declare that transfers, fraudulent as to any creditor, become void as to all creditors of the transferor (California Civil Code, Section 3439).

(c) That the Circuit Court of Appeals by its decision ignored the decisions of the highest Court of the State of California in holding that the defendant (respondent herein) had title to the stocks obtained by a retransfer from George A. Barceloux, in that a corporation under the laws of the State of California cannot buy in or obtain title to its own stock unless that is necessary to save such corporation a loss, and no such loss was shown by the record herein.

See:

California Civil Code, Section 309 (as it was in 1926), and Section 342 (as it is at present);

Stevens v. Boyes Hot Springs, 113 Cal. App. 479, 482 (in which a hearing in the Supreme Court of California was denied on June 11, 1931, thus making it the latest and ruling decision);

Stewart v. Stewart Hotel Company, 33 Cal. Ap. 167, at 182.

3. That the Circuit Court of Appeals decided an important question of Federal law which has not been

but should be settled by the Supreme Court of the United States, in this:

(a) Whether Section 70 e of the National Bankruptcy Act gives the Trustee in Bankruptcy the right in an action to set aside a fraudulent conveyance to recover, at his option, either property or its value; or can the Trustee only recover value when the property is not at the time of the trial of the case in the possession of the transferee defendant.

(b) Whether a fraudulent transferee who has sold the property transferred prior to the commencement of the suit, can defeat the right of a plaintiff therein to recover value by repurchasing the property (as was attempted in the case at bar) after issue had been joined.

(c) Further, whether the Trustee in Bankruptcy loses the powers vested in him by Section 70 e of the National Bankruptcy Act by the prior conduct of one defrauded creditor when said Trustee represents other creditors as to whom the local law declares the transfer void.

4. That the Circuit Court of Appeals has decided a Federal question in conflict with applicable decisions of the Supreme Court of the United States, in this:

(a) That it held that a valid pledge can be created by the pledgor delivering to himself, as president of the pledgee corporation, the certificates of stock so sought to be pledged, and such decision is in conflict

with the decision of this Court in *Casey v. Cavaroc,* 96 U. S. 467, 486, and the subsequent decisions of this Court approving said case.

The decision at bar is also in conflict with the applicable local statutes and decisions, to-wit:

California Civil Code, Sections 2988, 2933, 3433, 3440;

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470,

and with the decision of the Ninth Circuit on the sufficiency of the delivery of the shares as against creditors of the transferee. See, *Harvey v. Stowe,* 219 Fed. 17, 22, based on said California statutes.

5. That the Circuit Court of Appeals rendered its decision in conflict with the decisions of another Circuit Court of Appeals and with the decisions of the Supreme Court of the State of California on the same matter, in this:

(a) That upon a sale by the pledgee of pledged security, in form valid at law but invalid in equity, the pledge continues to exist, and any subsequent sale of said property to a third party, or any other renouncement of such relationship of pledgee and pledgor, gives rise to a cause of action in favor of the pledgor (or in the case at bar the Trustee in Bankruptcy) for conversion to recover the value of the property so converted at the date of the sale, less the amount of indebtedness found to be secured by such pledge to said pledgee. And the decision of the

Circuit Court of Appeals on this question is a decision of an important question of local law in a way probably in conflict with the applicable local decisions and also applicable decisions of other Circuit Courts of Appeals.

See:

Lowe v. Ozman, 3 Cal. App. 387, 394 (identical facts);

Bell v. Bank of California, 153 Cal. 234, 238;

Henning v. Aiken, 91 Cal. App. 246, 255, 256;

Dibert v. Wernicke, 214 Fed. 673, at 682, 683 (C. C. A. 6th);

Feilbach Co. v. Russell, 233 Fed. 412, 415 (C. C. A. 6th).

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and forward to this Court a full and complete transcript of the record in the proceeding in said Circuit Court of Appeals had in the case numbered and entitled on its docket, No. 6400, Peter Barceloux Company, a corporation, Appellant, vs. F. E. Buffum, as Trustee in Bankruptcy of Henry Joseph Barceloux (a Bankrupt), Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgment herein of said Circuit Court of Appeals be reversed by this Court,

and for such further relief as this Court may deem proper.

Dated, Sacramento, California,
December, 1932.

F. E. BUFFUM,
As Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt,

By ROBT. T. DEVLIN,
WM. H. DEVLIN,
Solicitors for Petitioner.

ARTHUR C. DEVLIN,
A. I. DIEPENBROCK,
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Petitioner,

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PETER BARCELOUX COMPANY (a corporation),
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF THE COURTS BELOW.

The opinion of the United States District Court in and for the Northern District, Northern Division of California, in the above entitled cause is reported in 51 Fed. (2d) at page 80, and the opinion of the Circuit Court of Appeals for the Ninth Circuit, reversing the decree of the trial Court, is reported in 61 Fed. (2d) at page 145.

II.

JURISDICTION.

The date of the final decree in the District Court under review is September 19, 1930 (R. 104), and the date of the decision of the Circuit Court of Appeals to be reviewed is September 8, 1932 (R. 504), rehearing of which was denied November 21, 1932 (R. 507).

The nature of the case is that of a suit in equity to have certain transfers of property decreed fraudulent and is based upon and arises under a law of the United States to assert a right thereby given, to-wit, upon and under National Bankruptcy Act Section 70 e (U. S. Code, tit. 11, Section 110 e) to recover the value of property (shares of stock) alleged to be reasonably worth the sum of $80,000.00 (R. 5) and for an accounting to ascertain the exact value thereof (R. 5, 11, 12). The decree of the trial Court was in favor of this petitioner, plaintiff below, for the sum of $106,409.44, as found to be the value claimed, and for costs (R. 103), which said decree was reversed by the Circuit Court of Appeals on the date above mentioned (R. 504, 507), with an opinion by a divided Court (R. 456, et seq.) holding, among other things, that where the property is subject to the jurisdiction of the Court, it is not proper to give a decree in money (R. 474, 475); and accordingly, the Circuit Court of Appeals, deeming itself to have such jurisdiction over the property (shares), although appellee, petitioner here, disputed that jurisdiction, reversed the decree with directions for sale of the property (shares) in question and for a distribution of the

proceeds (R. 482). The effect of such decision was to deny the right asserted by the bill under Section 70 e hereinbefore cited.

The jurisdiction of the District Court was thus founded upon U. S. Judicial Code Section 24 (1) (a), as read with but not dependent on National Bankruptcy Act Section 23 b (U. S. Code, tit. 11, Section 47 (b)) as amended by Act of February 13, 1925 (43 Stat. 936, 937, 941). The appellate jurisdiction of the Circuit Court of Appeals is founded on U. S. Judicial Code Section 128, as amended by Act of February 13, 1925 (43 Stat. 936, 937) and by Act of May 27, 1926 (44 Stat. 664).

The cases believed to sustain the jurisdiction of this Court are:

Page v. Arkansas Natural Gas Corp., 286 U. S. 269;

Flanders v. Coleman, 250 U. S. 223;

Collett v. Adams, 249 U. S. 545;

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426;

St. Louis, K. C. & C. R. Co. v. Wabash R. Co., 217 U. S. 247, 251;

Forsyth v. Hammond, 166 U. S. 506, 514.

III.

STATEMENT OF THE CASE.

A statement of the case has already been made in the petition for certiorari (pp. 2-7) under the

heading "Summary Statement of Matters Involved," and to avoid repetition, that statement is hereby adopted and made a part of this brief to the same effect as if fully set out herein. The statement thus referred to may be supplemented by the statement of the nature of the case found in the preceding part II of this brief. In the argument of the respective points made herein, further references to the particular portions of the record will be found.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in denying the right of plaintiff to elect to sue for a recovery of the value of the shares of stock under National Bankruptcy Act, Section 70 e, in a suit in equity, where, as appeared in this suit, defendant (after parting with all title to said shares) after issue joined, had repossessed itself of the certificate for said shares endorsed for transfer; and the Court erred in holding that under these circumstances a decree for recourse to the shares in specie was the only permissible relief, thus misconstruing said Section 70 e and denying the right thereby given to this plaintiff to elect to seek value.

2. The Circuit Court of Appeals erred in entertaining a tender of the 2499 shares of the defendant's stock (being only a part of the shares involved) and in entertaining an offer of a release to be made by George A. Barceloux (not a party to this suit), which

tender and offer of release were made for the first time on appeal, and as made, were contrary to the defenses and claims of full and valid legal title in the defendant made in its answer with a prayer that title be quieted and declared to be good and valid in it. the said action of the Circuit Court of Appeals being the reception of new evidence on appeal contrary to U. S. Code, Title 28, Section 863.

3. The Circuit Court of Appeals erred in assuming a jurisdiction belonging to a court of bankruptcy, in that the decision of said court undertakes to determine priorities and distributive rights in the 2499 shares ordered to be resold under the alleged pledge, in this suit in equity brought under National Bankruptcy Act Section 70 e, the jurisdiction of the bankruptcy court to adjudge priorities being exclusive by virtue of National Bankruptcy Act Sections 2 (7), 47 (a) (2) and 70 (b), (c).

4. The Circuit Court of Appeals erred in holding creditor Freeman estopped to assert fraud in the alleged pledge by reason of his having taken additional junior security, and in holding that plaintiff Trustee, suing for all creditors, was also estopped by reason of Freeman's supposed estoppel and the elimination of all question of fraud thereby.

5. The Circuit Court of Appeals erred in holding that the defendant could, under the law of California, resume title to its own shares by a voluntary retransfer to it after a sale of absolute title, without any evidence in the record to show that such retransfer was made to save itself from loss because of the

insolvency of the purchaser, or his inability to pay the agreed price to the defendant, and without any evidence of any other fact which in law justifies such acquisition of its own shares.

6. The Circuit Court of Appeals erred in assuming to have jurisdiction over the 2499 shares of defendant's stock by reason of the introduction of the cancelled certificate No. 5 (Defendant's Exhibit No. 3, the stock book with certificate attached), which was put in evidence by plaintiff as proof bearing on fraud; and because George A. Barceloux, the transferee of and retransferor to defendant of the said shares, was not a party to this suit and hence would not be bound by the decree in that respect.

7. The Circuit Court of Appeals erred in reversing the decree of the trial Court for the value of the 2499 shares at the time of the purported pledge sale, contrary to its own finding that title to said shares was revested in defendant by the retransfer of the shares to it, disregarding that the sale by it to George A. Barceloux was in law a conversion by the pledgee in repudiation of the pledgor's general property sufficient to sustain the decree as made.

8. The Circuit Court of Appeals erred in law in holding and finding that the purported delivery of the certificates by the pledgor to himself as president of pledgee corporation, himself keeping exclusive possession, constituted a valid pledge as against creditors.

9. The Circuit Court of Appeals erred in law in rejecting the trial Court's findings of fact that there was fraud in the alleged pledges, which findings were

based on oral evidence of witnesses heard and observed by the trial judge, and also based on written evidence consistent with his findings and inconsistent with the Appellate Court's finding that the pledge was in good faith.

V.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

A. The Circuit Court of Appeals erroneously construed Section 70 e of the National Bankruptcy Act in denying Trustee (petitioner) the election to recover value in an action under said section.

B. In a federal equity appeal, no new evidence can be received (U. S. Rev. Stat., Section 698; U. S. Code tit. 28, Section 863).

C. There is no jurisdiction in a federal court of equity in a controversy arising out of bankruptcy to order priorities adjusted, property of bankrupt estate sold, and proceeds distributed, that being the exclusive province of a Court of Bankruptcy.

D. The Trustee is not precluded, in a suit on behalf of all creditors, from asserting that a transfer was fraudulent by the fact that one of the creditors took additional security which recited the existence of the transfer assailed as fraudulent.

E. Under the law of California, a corporation of that State is prohibited from acquiring its own issued shares except under circumstances none of which ap-

pear in this record (California Civil Code, Section 309, in force in 1926).

F. It was error to assume jurisdiction over the 2499 shares of defendant's stock by reason of the mere introduction of certain cancelled certificates in evidence.

G. The sale by the corporation of the stock acquired by it through an invalid pledge sale constituted a conversion, and therefore the money judgment was proper and should have been affirmed.

H. The decision of the Circuit Court of Appeals ignored the trial Court's finding that the pledge of April 27, 1926, was void as to creditors for want of immediate delivery and a continued change of possession as required by Section 3440 of the Civil Code of the State of California.

I. The trial Court's findings of fact should not be reversed on appeal when based upon the testimony of witnesses heard and observed by the trial judge and also based on written evidence consistent with his findings and inconsistent with contrary findings.

A.

THE CIRCUIT COURT OF APPEALS ERRONEOUSLY CONSTRUED SECTION 70 e OF THE NATIONAL BANKRUPTCY ACT IN DENYING TRUSTEE (PETITIONER) THE ELECTION TO RECOVER VALUE IN AN ACTION UNDER SAID SECTION.

National Bankruptcy Act, Section 70 e provides that:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication."

The present suit, having been brought to recover value and not to recover specific property, was an election by the plaintiff Trustee to claim the right given by the above cited statute to sue for the property or its value.

The Circuit Court of Appeals held that the Trustee had no election, but must seek the property unless that relief is made impossible by the fraudulent transferee by its inability to return the same at any time before final decree (R. 474, 475). For this the Court cites no cases involving that section. In denying this right of election, the decision is in direct conflict with the previous decisions of the Ninth Circuit, which expressly declare that such right of election exists, and which were believed to have established such to be the law in that Circuit:

Schainman v. Dean, 24 Fed. (2d) 475, at 476; certiorari denied 278 U. S. 598;

Brainard v. Cohn, 8 Fed. (2d) 13, 15;

Oliver v. Brennan (In re Wright Motor Company), 299 Fed. 106, 108.

These cases are not in any way mentioned or discussed in the majority opinion of the Circuit Court of Appeals in this case, but they are mentioned in

the dissenting opinion of Circuit Judge Sawtelle (R. 487); and he also states in that opinion that Section 70 e of the Bankruptcy Act "gives the Trustee the unrestricted election of whether he shall sue for the property or its value." (R. 497).

Counsel have been unable to discover, after exhaustive search, any decisions in any of the other Circuits which have passed upon this question (except that there are some decisions to be found wherein value decrees were given where property apparently was available, and without any question of the impropriety of such a decree), nor have counsel been able to discover any decisions by this Court indicative of the proper construction of Section 70 e in that regard. It was the contention and is the belief of counsel for petitioner that the purpose of Section 70 e, above cited, was to enable the Trustee, as a liquidating officer for all the creditors, to recover that which is more advantageous to the creditors with the least possible litigation. The construction given in the case at bar gives the advantage, on the other hand, to the alleged fraud feasor. This question, we believe and urge, is one which should be settled by this Court. Petitioner believes and urges that the question thus presented is of grave importance and widespread concern. In view of the absence of precedents upon the question in the decisions of this Court and in the decisions of the other Circuit Courts of Appeals and of the conflict of decisions in this Circuit, Trustees in bankruptcy who may seek to set aside fraudulent transfers will be embarrassed in deciding how to sue.

Trustees in bankruptcy under like circumstances are entitled to have the question definitely decided.

Supplementary to the foregoing argument, it may be said that the Circuit Court of Appeals, in deciding that in any creditor's suit, under or not under Bankruptcy Act Section 70 e, against a fraudulent transferee of property, a money decree could not be entered if at the time of the decree the specific property may be reached and subjected to the creditor's claim, relied upon the decision of this Court rendered in the case of *Dunphy v. Kleinschmidt*, 11 Wall. 610 (R. 479, quoting from the opinion of this Court) and holding that a money decree in such circumstances was improper. This, it is submitted, misapplied the decision and opinion of this Court. The opinion in *Dunphy v. Kleinschmidt* does not, it is believed, fairly admit of that construction; but, on the contrary, it recognizes that a money decree may be had in equity in such a suit under proper circumstances if arrived at according to such procedure as is proper in a court of equity. It is not believed that according to the principles of equity, any precedents can be found for allowing a fraudulent transferee to part with the transferred property and thereafter, by recovering the possession of it subsequent to the commencement of the suit, then require the plaintiff creditor to look exclusively to such property, if it has in the meanwhile depreciated in value. In such a situation, the value at the time of the suit or of the fraud should be the amount awarded, nor would the principles of equity tolerate speculation by a party to the fraud in

the possibility of an appreciated value resulting to his profit.

B.

IN A FEDERAL EQUITY APPEAL, NO NEW EVIDENCE CAN BE RECEIVED (U. S. REV. STAT. SECTION 698; U. S. CODE TIT. 28, SECTION 863).

It is error to receive new evidence in an equity appeal.

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 549;

Blease v. Garlington, 92 U. S. 1, 4;

Roemer v. Simon, 91 U. S. 149, 150.

The tender of the 2499 shares of defendant's stock and the offer of a release of all rights by George A. Barceloux (not a party to this suit), amounts in law to new evidence, and thereby departs from the course of judicial proceedings on review in an equity case established by statute, as well as by general principles of review. In the majority opinion of the Circuit Court of Appeals in this case, it is said (R. 473), "that the company has tendered the stock to the clerk of the Court for such disposition as may be made thereof in equity and good conscience." There is nothing in the record to show that any tender whatever was made in the trial Court, and in fact none was made. To the contrary, the answer prays:

> "that the title of the Peter Barceloux Company in and to the securities in this answer herein mentioned, be declared to be good and valid;" (R. 28).

The Circuit Court of Appeals, holding that a tender and offer of release were made, gave directions that the shares be resold under proceedings to be had in the trial Court, and thereby directed such a decree as the trial Court itself could not have made.

See:

Lane v. Pueblo of Santa Rosa, 249 U. S. 110, 114;

Realty Acceptance Corp. v. Montgomery, 284 U. S. 547, 551.

The record does show that the stock book of Peter Barceloux Company was introduced in evidence by the plaintiff (R. 302) and such stock book is Plaintiff's Exhibit No. 3 sent up herewith, in which Certificate No. 5 for 2499 shares issued to Henry Barceloux and thereafter cancelled, and Certificate No. 12 issued in lieu thereof to Peter Barceloux Company, as pledgee, of the same shares, and thereafter cancelled, both appear, attached to said book. No certificates evidencing the ownership of said shares at the time of the trial were put in evidence, and no evidence thereof appears except that shown by certificate stubs contained in said stock book. The record, therefore, does not show any tender into the trial Court, but rebuts it. Moreover, it appears that at the time of final decree in the District Court, a tender of all the shares as pledged would have been impossible because certain bank, garage and insurance shares covered by the alleged pledge had been sold by the defendant and were no longer in its possession or control (R. 180, 182, 189, 190). In denying rehearing the Circuit

Court of Appeals credited the found value of these shares upon the pledge debt (R. 507).

C.

THERE IS NO JURISDICTION IN A FEDERAL COURT OF EQUITY IN A CONTROVERSY ARISING OUT OF BANKRUPTCY TO ADJUST THE PRIORITIES AND DISTRIBUTE THE PROCEEDS OF THE PROPERTY OF THE BANKRUPT ESTATE, THAT BEING THE EXCLUSIVE PROVINCE OF A COURT OF BANKRUPTCY UNDER NATIONAL BANKRUPTCY ACT, SECTIONS 2 (7), 47 (a), (2), AND 70 (b), (c).

The Circuit Court of Appeals in its opinion reverses and remands the cause to the trial Court, "to fix the time, place and terms of the sale of said stock, and to direct the application of the proceeds of the sale in accordance herewith" (R. 483). This has reference to that part of the opinion immediately preceding, in which the Circuit Court of Appeals holds that the stock should be resold under the pledge, subject to,

> "an application of the proceeds to the claims of the Barceloux Company aggregating $33,184.41 * * * If all the stock pledged to the Peter Barceloux Company sells for more than the amount due to that company as herein determined, the surplus shall be paid to the trustee to be applied to the claim of Freeman, as alleged in the complaint or bill, herein, and if there be any surplus over and above the claims of the Peter Barceloux Company and of Freeman, the balance should be applied to the claims of the general creditors" (R. 482, 483).

This direction casts upon the trial court in equity the exclusive duty of the Trustee to collect, sell and reduce to money the property of the estate for which he is Trustee, all of which must be done under direction and approval of the bankruptcy court [Bankruptcy Act, Sections 47 (a) (2) and 70 (b)]. The Trustee must make the conveyance [Bankruptcy Act, Section 70 (c)]. Exclusive jurisdiction is specifically given to the court of bankruptcy by Bankruptcy Act, Section 2 (7).

Freeman was not a party to the suit, having been dismissed therefrom before the trial (R. 29), and thus no claim of his remained involved in this suit.

This Court has decided that how the fruits of the litigation shall be distributed is for the bankruptcy court in which the proceeding is pending to determine.

Globe Bank & Trust Co. v. Martin, 236 U. S. 288, 304.

In *Isaacs v. Hobbs Tie & Timber Company,* 282 U. S. 734 at 738, speaking of the adjustment of the priorities of conflicting claimants asserting liens existing at the time of the commencement of the bankruptcy proceeding, this Court has said:

> "* * * it is solely within the power of a court of bankruptcy to ascertain their validity and amount and to decree the method of their liquidation. * * * The exercise of this function necessarily forbids interference with it by foreclosure proceedings in other courts, which save for the bankruptcy proceeding would be competent to that end. * * *

> The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate and the preservation of the rights of both secured and unsecured creditors. * * *
>
> Indeed, a court of bankruptcy itself is powerless to surrender its control of the administration of the estate."

The directions given by the Circuit Court of Appeals are in conflict with the principle there laid down and with the statute.

D.

THE TRUSTEE IS NOT PRECLUDED, IN A SUIT ON BEHALF OF ALL CREDITORS, FROM ASSERTING THAT A TRANSFER WAS FRAUDULENT BY THE FACT THAT ONE OF THE CREDITORS TOOK ADDITIONAL SECURITY WHICH RECITED THE EXISTENCE OF THE TRANSFER ASSAILED AS FRAUDULENT.

In the case at bar, the Circuit Court of Appeals held that creditor Freeman was estopped to assert fraud in the pledge herein assailed of the Peter Barceloux Company shares, because Freeman had taken additional security reciting the existence of a prior pledge of the same shares to the Peter Barceloux Company itself. The Circuit Court of Appeals held that since the pledge agreement to Freeman, dated June 30, 1926, recited that it was subject to a prior pledge to the Barceloux Company, Freeman is estopped from attacking the validity of the prior pledge or from asserting that it was made to defraud creditors (R. 466), and that since the complaint failed

to allege in clear terms that there were other creditors than Freeman at the time of the alleged fraudulent transaction, and since the proof at the trial failed to show the existence of other creditors, [The opinion infers their existence, R. 472] or that they were defrauded thereby, there was no justification for a decision in favor of the Trustee on appeal based upon the rights of other creditors (R. 472).

The above opinion is erroneous in several particulars, in this:

(a) The Trustee is not precluded from asserting fraud unless all of the creditors, then existing and who might have asserted it, are estopped.

(b) This is not a suit by Freeman through the Trustee to enforce his junior pledge, and in such a suit only would he be estopped by such a recital.

In support of the first reason herein designated as (a), we submit that the Court erred in finding that Freeman was the only creditor upon whom the Trustee petitioner premised his recovery. The bill of complaint alleged that the bankrupt and the transferee consummated the transaction with intent to hinder, delay and defraud all nonkindred creditors (R. 5, 6, 8, 9 and 10), and that there existed at the times in question many unsecured creditors of said bankrupt (see Paragraph VII of the bill of complaint, R. 8). It is not necessary that the bill of complaint set forth the names and the amount due to each of the creditors then existing, as the Circuit Court of Appeals holds, but a general allegation that there were creditors is sufficient. See:

Collier on Bankruptcy, Volume 1, page 1782; *Keller v. Fowler Bros. & Cox,* 148 Tenn. 571; *Dodd v. Raines,* 1 Fed. (2d) 658 at 660; and see *Flanders v. Coleman,* 250 U. S. 223, 229.

The proof supported the pleading in this: that the bankrupt testified that at the time of the transfers he was indebted to twelve unsecured creditors to whom he owed the total sum of $28,537.97, exclusive of the claims of Freeman and the Barceloux Company. His testimony was corroborated (R. 294) by the introduction as exhibits of the verified proofs of claims filed in the bankruptcy proceeding, which showed total unsecured claims in excess of $40,000.00 owing to parties other than Freeman and the Barceloux Company at the time of the various transactions (Plaintiff's Exhibit No. 1, R. 294). The trial Court found that there "were many and represented by plaintiff herein" (R. 34). All creditors then existing were defrauded thereby, as shown by the fact that the bankrupt transferred all of his properties to the respondent herein and members of his family, and when adjudicated he had no properties remaining from which these nonkindred creditors could satisfy their demands (R. 489). Under local law, intent to defeat any creditor renders the transfer void as to all who were then his creditors (see Section 3439, Civil Code of the State of California, and also Section 3440 of said Code).

The decision of the Circuit Court of Appeals deprives the Trustee (an officer of the Court) of the right of representing all creditors granted to him by

Section 70 e of the National Bankruptcy Act and places a construction upon said Section in direct conflict with the controlling decisions of all other Circuit Courts of Appeals and the decision of this Court, rendered since the trial of the case at bar, in *Moore v. Bay,* 284 U. S. 4.

In support of the second ground designated above as (b), we submit:

This is not an action to enforce Freeman's pledge, and the Trustee in Bankruptcy in the case at bar did not represent Freeman as a pledgee or under his said pledge agreement. It is only the rights of the general unsecured creditors that passed to the Trustee under Section 70 e of the National Bankruptcy Act, and therefore the Trustee represented Freeman as to that part of his claim against the bankrupt which remained unsecured, as shown by his proof of debt filed in the bankruptcy proceeding (see Plaintiff's Exhibit No. 1).

Further, the cases upon which the Circuit Court of Appeals relies as the basis for its holding upon estoppel do not warrant the construction given them. They were all suits to foreclose second mortgages which contained recitals that they were such and subject to prior mortgages. Where a party to such a second mortgage seeks relief upon his right as a common creditor independent of his contract of mortgage, the principles therein announced are not applicable.

Old National Bank v. Heckman, 148 Ind. 507;
Jones on Mortgages, Eighth Edition, Volume 2, Section 912, page 256.

E.

UNDER THE LAW OF CALIFORNIA, A CORPORATION OF THAT STATE IS PROHIBITED FROM ACQUIRING ITS OWN ISSUED SHARES EXCEPT UNDER CIRCUMSTANCES NONE OF WHICH APPEAR IN THIS RECORD (CALIFORNIA CIVIL CODE, SECTION 309, IN FORCE IN 1926).

The Circuit Court of Appeals held that the defendant (respondent herein) acquired legal title to the 2499 shares of its own stock by a transfer from George A. Barceloux, who had purchased these shares from it after it had bought them in at the alleged pledge sale (R. 481), and that the retransfer of the stock of the corporation to itself merely restored the *status quo* and was in "no sense a purchase by the corporation of its stock in violation of the statutory rule" (R. 482). The law in the State of California at the time in question and at all times since has forbidden a corporation to repurchase its own stock except under specified conditions, and the transaction shown in this record is not one of them. (See Section 309 of the Civil Code of the State of California prior to 1931; thereafter Section 342 of the Civil Code of the State of California.*)

The Circuit Court of Appeals relies in support of the above holding on *Ralston v. Bank of California,* 112 Cal. 208 (R. 482). The construction thus given is in direct conflict with later and ruling decisions of the State of California. See *Stevens v. Boyes Hot Springs Company,* 113 Cal. App. 479, 482, in which a hearing in the Supreme Court of California was denied on June 11, 1931, and which was thus made

*The above Civil Code sections are set out in full in the appendix.

the ruling decision on California law in this regard. See, also, *Wagg v. Toler,* 80 Cal. App. 501, 510 prior thereto.

In *Stewart v. Stewart Hotel Company,* 33 Cal. App. 167, at 182 (a rehearing was denied by the Supreme Court of California) the highest Courts of California have held that the liability of a stockholder secured by his stock is an asset of the corporation and if the stockholder is solvent and able to pay, the corporation would have no more right to exchange that asset for his stock than to buy the stock outright.

Since the record does not show that George A. Barceloux was insolvent, the corporation's attempt to repurchase said stock was, under local law, both *ultra vires* and *malum prohibitum,* and hence, utterly void and incapable of estoppel. The Appellate Court's direction being based upon the theory that title was reinvested by a transfer which the Courts of California hold void, the appellee's (petitioner herein) only available remedy is a money decree based on value, and the tender elsewhere discussed in this brief is ineffectual.

The conflict between the decision of the Circuit Court of Appeals in the case at bar and the decisions of the Courts of California in this matter, cited above, is such in gravity and importance as to warrant this Court in granting its writ of certiorari, according to the principles announced in *Forsyth v. Hammond,* 166 U. S. 506, 515.

F.

IT WAS ERROR TO ASSUME JURISDICTION OVER THE 2499 SHARES OF DEFENDANT'S STOCK BY REASON OF THE MERE INTRODUCTION OF CERTAIN CANCELLED CERTIFICATES IN EVIDENCE.

The Circuit Court of Appeals in its opinion assumes to have jurisdiction over the 2499 shares of the Peter Barceloux Company's stock covered by the alleged pledge, by reason of the fact that certificates which represented those shares were in evidence in the trial Court and were deposited with the Court (R. 474). Since these certificates were introduced in evidence by plaintiff Trustee (R. 302, Plaintiff's Exhibit No. 3), as a part of his proof of the fraudulent nature of the transfer and since the certificates appear on the face of them to have been cancelled, and since the stock book (R. 302, Plaintiff's Exhibit No. 3) shows other certificates have been issued in lieu thereof and outstanding and which were not introduced in evidence, it thus appears that there is no predicate either for a tender or for jurisdiction over the shares.

G.

THE SALE BY THE CORPORATION OF THE STOCK ACQUIRED AT A PLEDGE SALE HELD INVALID CONSTITUTED A CONVERSION AND THEREFORE THE MONEY JUDGMENT WAS PROPER AND SHOULD HAVE BEEN AFFIRMED FOR THAT REASON.

Since the Circuit Court of Appeals has directed that the shares alleged to have been pledged shall be resold, said Court must be regarded as having held

that the pledge sale was invalid and that the pledge continues to subsist.

The majority opinion states that:

> "There is a divergence of views among the members of the court as to the consequences which should flow from the manner and method of the sale." (R. 473.)

The sum of these transactions, as found by the Circuit Court of Appeals, is that the defendant corporation by reselling the shares to George A. Barceloux which it had bought in at the invalid pledge sale, exercised acts of absolute ownership over all of these shares, and thereby repudiated the pledge, if there was one. This is a conversion under the local and general law. See:

Lowe v. Ozmun, 3 Cal. App. 387, 394 (identical facts);

Bell v. Bank of California, 153 Cal. 234, 238;

Henning v. Akin, 91 Cal. App. 246, 255, 256;

Dibert v. Wernicke, 214 Fed. 672 at 682, 683 (identical facts);

Feilbach Co. v. Russell, 233 Fed. 412, 415 (C. C. A. 6th).

The attempted retransfer of the shares by George Barceloux to the defendant corporation did not cure the conversion or absolve the corporation from liability for the money value of the converted property.

Henning v. Akin, 91 Cal. App. 246, at 255.

The value at that time having been found by the Court below (R. 61), the record thus afforded every-

thing necessary to affirm the judgment instead of reversing it, and it should have been affirmed.

Johnson v. Peoples State Bank, 22 Fed. (2d) 211, at 213.

Furthermore, with respect to certain shares of stock other than the 2499 shares and covered by the same pledge, the defendant corporation, after receiving them back from George A. Barceloux, sold them again to others (R. 182, 189, 190) and never regained possession, and the decision of the Circuit Court of Appeals upon rehearing recognized the binding effect of that sale by allowing a credit equal to the found value at the time of the conversion (R. 507).

H.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IGNORED THE TRIAL COURT'S FINDING THAT THE PLEDGE OF APRIL 27, 1926, WAS VOID AS TO CREDITORS FOR WANT OF IMMEDIATE DELIVERY AND A CONTINUED CHANGE OF POSSESSION AS REQUIRED BY SECTION 3440 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA.

The particular reason assigned by the trial Court for its finding and conclusion in this regard was that Henry J. Barceloux, the debtor, delivered the certificates bearing a blank endorsement and the written pledge agreement to himself, as president of the Peter Barceloux Company, and kept them in that equivocal position until he resigned as president. It was material error for the Circuit Court of Appeals not to pass on this question, and the question itself was material and decisive.

The provisions of Section 3440 of the Civil Code of California are applicable to a pledge of corporate stock, and for such pledge to be valid as against creditors of the pledgor, it must be accompanied by immediate delivery of the certificate and an actual and a continued change of possession thereof.

See:

McFall v. Buckeye etc. Assn., 122 Cal. 468, 470 and

Harvey v. Stowe, 219 Fed. 17, 22, a decision of the Ninth Circuit Court of Appeals based upon California statutes and law.

This Court, in construing like statutes of other states, has also so held.

See:

Casey v. Cavaroc, 96 U. S. 467, 486;

Christian v. Atlantic & N. C. R. R. Co., 133 U. S. 233, 241.

The decision of the Circuit Court of Appeals is in direct conflict with *Casey v. Cavaroc,* 96 U. S. 467, in which case (like the case at bar) the president of the pledgor endeavored to consummate a pledge by the delivery of the securities to himself, as agent of the pledgee, and this Court held that such pledge was invalid as to creditors for the want of a legal delivery.

The decision of the Circuit Court of Appeals thus conflicts not only with the decisions of this Court, but with the statute and the decisions of the Courts of California as announced in *McFall v. Buckeye etc. Assn.,* 122 Cal. 468, and with its own previous deci-

sion based upon California statutes and law in *Harvey v. Stowe,* 219 Fed. 17, 22.

This conflict is such in importance as to fall within the reasons announced by this Court in *Forsyth v. Hammond,* 166 U. S. 506, 515, as affording a sufficient reason for the granting of a writ of certiorari.

I.

THE TRIAL COURT'S FINDINGS OF FACT SHOULD NOT BE REVERSED ON APPEAL WHEN BASED UPON THE TESTIMONY OF WITNESSES HEARD AND OBSERVED BY THE TRIAL JUDGE, AND ALSO BASED ON WRITTEN EVIDENCE CONSISTENT WITH HIS FINDINGS AND INCONSISTENT WITH CONTRARY FINDINGS.

The particular finding referred to is that of the trial Court finding fraud in the pledge with intent to hinder and delay creditors. The trial Court's findings were:

> "Moreover, taking into account all the facts and circumstances in evidence, all that makes for credibility of witnesses and weight to be given to evidence, all the indefinables impressions of the trial, the conviction is compelled that the transfers involved were made with intent by all parties to hinder, delay and defeat Henry's creditors. * * * Their more or less contradictory testimony to their own innocency, fails to persuade to [sic] outweigh all that gives that sinister aspect to their actions which establish their intent not only to acquire Henry's properties, to satisfy their claims, perhaps to protect him also, but also to foil efforts of his unsecured creditors to make their claims out of his properties" (R. 34, 35).

The Ninth Circuit Court of Appeals has repeatedly held that under such circumstances it would not be inclined to disturb lightly the findings of the lower Court.

Jones v. Jones, 35 Fed. (2) 943, 945;
John T. Porter Co., et al. v. Java Cocoanut Oil Co., Ltd., 4 Fed. (2d) 476, 478, certiorari denied, 268 U. S. 697-698;
Ostbern v. Dean, 18 Fed. (2d) 1019, 1020;
Monson v. Hibler, 24 Fed. (2d) 909, 910.

These cases are cited in the dissenting opinion by Circuit Judge Sawtelle (R. 493).

The circumstances under which a Circuit Court of Appeals is warranted in disregarding the findings of the trial Court are set down and explained in Chief Justice Taft's opinion in *Harkin v. Brundage,* 276 U. S. 36, 53, and the Circuit Court of Appeals did not conform thereto.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the proper construction of the National Bankruptcy Act may be had, settled and determined, that conflicts mentioned herein between national and state Courts be settled and removed, that the practice and jurisdiction of the Circuit Courts of Appeals upon appellate review be more clearly defined, and that to such ends, a writ of certiorari should be granted, and this Court should

review the decision of the Circuit Court of Appeals and finally reverse it.

Dated, Sacramento, California,
December, 1932.

Respectfully submitted,
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(Appendix Follows.)

Appendix

California Civil Code, Section 3439:

"Every transfer of property or charge thereon made, every obligation incurred, and every judicial proceeding taken, with intent to delay or defraud any creditor or other person of his demands, is void against all creditors of the debtor, and their successors in interest, and against any person upon whom the estate of the debtor devolves in trust for the benefit of others than the debtor."

California Civil Code, Section 3440, first paragraph:

"Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry or respondentia, is conclusively presumed if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others than himself, and against purchasers or encumbrancers in good faith subsequent to the transfer."

California Civil Code, Section 309, as it stood in 1926:

"Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; *nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock,* except as provided in section three hundred fifty-nine of this code. For a violation of the provisions of this section, the directors under whose administration the same may have happened (except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen) are, in their individual or private capacity, jointly and severally liable to the corporation, and to the creditors thereof, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced or debt contracted. Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence" (italics ours).

California Civil Code, Section 342 (enacted 1931):

"No corporation shall purchase or agree to purchase, or cause or permit any corporation which

it controls to purchase or agree to purchase, or employ or assist any person or corporation to purchase or agree to purchase for its account any of its shares except as follows:

(1) *To collect or compromise in good faith, a debt,* claim or controversy with any shareholder;

(2) *From shareholders who by reason of dissent* are entitled to be paid the fair cash value of their shares;

(3) *From one who as an employee other than as an officer* or director has purchased such shares from the corporation under an agreement reserving to the corporation the option to repurchase or obligating it to repurchase;

(4) *To eliminate fractional shares;*

(5) *To purchase shares subject to redemption* at prices not exceeding the redemption price thereof;

(6) *To carry out provisions of its articles authorizing conversion* of its shares; and

(7) *Subject to limitations, if any, contained in its articles,* only from earned surplus.

A corporation shall not purchase its own shares of any class in any case when there is reasonable ground for believing that the corporation is unable, or, by such purchase, will be rendered unable, to satisfy its debts and liabilities when they fall due. Nothing in this section shall be construed to prevent a corporation from acquiring its own shares by gift or bequest or upon a merger with or distribution of the assets of another corporation (Added by Stats. 1931, p. 1800)."